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IN THE

Supreme Court of the United States

No. 73-2051

UNITED STATES OF AMERICA ex rel. JOSEPH BOMBACINO,

Petitioner,

vs.

PETER BENSINGER,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 498 F. 2d 875 (1974).

JURISDICTION

Jurisdiction in this Court has been adequately alleged.

QUESTION PRESENTED

Whether it is constitutionally permissible to confer upon a prosecutor the discretion to try a sixteen year old juvenile as an adult, subject to the Juvenile Court Judge's objection, where that Juvenile is alleged to have committed a crime according to the laws of the state.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the Petition.

REASONS FOR DENYING THE WRIT

The Illinois statute which was challenged below and which controlled the procedure used in the Circuit Court is § 702-7 (3) of the Illinois Juvenile Court Act [Ill. Rev. Stat., 1967, Ch. 37, § 702-7(3)]. That section provides:

> (3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposi-

> tion. If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.[1]

Initially, it should be noted that this statute specifically gives the State's Attorney the responsibility of determining whether a defendant shall be proceeded against in the juvenile court or in the adult court, subject only to an objection by the Juvenile Court Judge. Further, the section provides that if criminal proceedings are begun against the offender, any previously filed juvenile court petition *shall* be dismissed. Even a cursory reading of the statute reveals that the Illinois legislature intended to give the State's Attorney, not the court, the responsibility of making this decision.

The Illinois Supreme Court has held in *People* v. *Handley*, 51 Ill. 2d 229, 283 N.E. 2d 205 (1972), that the statute "does not vest jurisdiction in the court to determine the matter of waiver of jurisdiction." And in petitioner's direct appeal from his conviction, the Illinois Supreme Court said:

> . . . [T]he State's Attorney in Illinois is vested with the discretion to determine whether or not to proceed criminally against a juvenile offender, subject only to the right of the judge presiding in the juvenile division to object, in which event the matter is referred

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1. On January 1, 1973, three years after the facts in this case, the new Unified Code of Corrections became effective in Illinois, and that Act substantially changed this procedure. Section 702-7(3) of the Code requires a judicial investigation and a hearing.

> to the chief judge of the circuit court for his decision. (Ill. Rev. Stat. 1967, ch. 37, par. 702-7(3).) Thus under the procedure established by the Illinois Juvenile Court Act the role of the judge is greatly diminished. (*People* v. *Jiles*, 43 Ill. 2d 145.) Under our act a due process hearing as prescribed in *Kent* is not required at this stage of the proceeding. *People* v. *Bombacino*, 51 Ill. 2d at 20.

And since this court is bound by the construction given the statute by the Illinois Supreme Court, *U. S.* v. *Thirty Seven (37) Photographs*, 91 S. Ct. 1400 (1971); *Garner* v. *State of Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961), this decision must be premised upon the fact that in Illinois the procedure at bar is prosecutorial, as opposed to judicial, in nature. Any attempt to impose a judicial character or judicial procedures upon that decision would be totally inconsistent with the well-established and long standing rule cited above—that federal courts defer to the decisions of state tribunals when the construction of a state statute is at issue.

The proceedings in the Circuit Court of Cook County were in literal compliance with the Juvenile Court Act and its construction by the Illinois Supreme Court. A delinquency petition was initially filed, but when the State's Attorney subsequently determined that petitioner should be tried as an adult, he began adult proceedings and requested a dismissal of the juvenile petition. The court recognized the statutory prerogative of the prosecutor, cited the statute at issue and ordered:

> "Criminal proceedings instituted, juvenile petitions will be dismissed and their cases will be closed as to the Juvenile Court." (R. 40.)

The petitioner cites *Kent* v. *United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) as establishing the proposition that a juvenile defendant must be accorded fairness and due process by a juvenile court waiving its jurisdiction over the minor charged with a criminal offense. We strongly urge that the case does not control the interpretation of the Illinois statute in question. In *Kent*, the Court considered the Juvenile Court Act for the District of Columbia.[2] The statute articulated that the waiver decision was a judicial function. A hearing would be required to satisfy the need for a "full investigation" prior to granting waiver. But under the Illinois statute, the decision as to whether the petitioner would be tried in juvenile or adult court was a matter in the discretion of the prosecutor, not the court.

The most significant opinion dealing with this precise issue is *Cox* v. *United States*, 473 F. 2d 334 (4th Cir. 1973). The case involved a seventeen year old juvenile who participated in a bank robbery. The court held that prosecutorial discretion in the matter of court selection precluded a due process attack stating:

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2. If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases. D.C. Code Sec. 11-914 (1961) now sec. 11-1553 (Supp. IV, 1965)

"In the federal system there are no separate juverile courts. The district courts have jurisdiction to try juveniles, youths who have not yet attained their eighteenth birthdays. Under 18 U. S. C. A. § 5032, a juvenile charged with a federal offense not punishable by death or life imprisonment shall be prosecuted as a juvenile delinquent, if he consents to that procedure and unless the Attorney General has expressly directed that he be prosecuted as an adult. We do not have the problem of judicial waiver of the primary jurisdiction of a juvenile court to the jurisdiction of a general trial court. What is involved is a decision by the Attorney General to charge a juvenile with juvenile delinquency based upon his alleged violation of the law and to proceed against him as a juvenile, or to charge him as an adult with the substantive transgression of the law. As Judge Bryan points out, this is a prosecutorial decision beyond the reach of the due process rights of counsel and a hearing. *Cox, supra*, p. 334.

Many of the protections of the Bill of Rights extend far beyond the courtroom, of course, but the guaranty of a hearing found in the due process clause of the Fifth Amendment has traditionally been limited to judicial and quasi-judicial proceedings. It has never been held applicable to the processes of prosecutorial decision-making. The only proper question here, therefore, is whether the general statutory scheme is constitutional, whether Congress reasonably might vest in the Attorney General, rather than in a judge in a judicial proceeding, the responsibility of deciding whether or not to prosecute a juvenile as an adult. That question is appropriately answered affirmatively." *Cox, supra*, p. 336.

In another recent case, *U.S.* v. *Alexander*, 333 F. Supp. 1213 (D. D. C. 1971), the same distinction as in *Cox* v. *U.S.* was recognized. The court noted that the applicable

statute, the District of Columbia Court Reform and Criminal Procedure Act of 1970, gave the courts no jurisdiction to determine where a juvenile offender was to be tried, but gave the U.S. Attorney total discretion in making that decision. The Court thus distinguished *Kent* v. *U.S.* and held that under such a statute, the requirements of constitutional due process do not apply. In doing so, the court said:

> "Movants have sought to create the impression that the Act gives the United States Attorney a new and far-reaching discretion which enables him to ignore the traditional waiver proceeding. This is not the case. Unlike the situation in Kent, no right to waiver of jurisdiction is involved here. Jurisdiction for this class of offenders is placed by informed legislative action solely in the adult courts. The wide discretion vested in the prosecutor to bring charges or not to bring charges, to defer to a state or to select a federal forum, to reduce charges to lesser offenses, etc. is universally recognized. Nothing more is involved here. Powell v. Katzenbach, 123 U.S. App. D. C. 250, 359 F. 2d 234 (1965), cert. denied, 384 U.S. 906, 86 S. Ct. 1341, 16 L. Ed. 2d 359 (1966), reh. denied, 384 U.S. 967, 86 S. Ct. 1584, 16 L. Ed. 2d 679 (1966); Newman v. United States, 127 U.S. App. D. C. 263, 382 F. 2d 479 (1969); Hutcherson v. United States, 120 U.S. App. D. C. 274, 345 F. 2d 964, cert. denied, 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151 (1965). Indeed this Circuit recently reinforced the absolute nature of the prosecutor's discretion even in circumstances that had led the trial judge to believe a clear abuse of that discretion was involved. United States v. Gainey, 142 U.S. App. D. C. 262, 440 F. 2d 290 (1971)." 333 F. Supp. at 1216-1217.

It is essential that prosecutorial discretion not be infringed upon in these areas because it is an executive func-

tion rather than a judicial one. In *United States* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), a district court adjudged a U.S. Attorney guilty of civil contempt for failure to obey an order of the court which directed him to sign an indictment returned by a federal grand jury. That order was reversed upon appeal, and the court stated:

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

It is well settled that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 386 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446. The Court should recognize that a decision invalidating the statute in question would serve to undermine the concept of prosecutorial discretion in its many facets. The recognition of this authority has been upheld in numerous cases. See: *Rosenberg* v. *U.S.*, 346 U.S. 273, 294-95 (1953); *U.S.* v. *Baumgarten*, 300 F. 2d 807, 808 (2nd Cir. 1962); *Siravo* v. *U.S.*, 377 F. 2d 469, 473 (1st Cir. 1967); *United States* v. *Eisenmann*, 396 F. 2d 565, 567-68 (3nd Cir. 1968); *Black* v. *U.S.*, 405 F. 2d 187 (5th Cir. 1968); *U.S.* v. *Escobar*, 410 F. 2d 749 (5th Cir. 1969); *Elrich* v. *U.S.*, 283 F. 2d 481 (5th Cir. 1957); *Boggs* v. *Raines*, 273 F. 2d 636 (10th Cir. 1959). If prosecutorial discretion is limited in this way, this vital

tool will lose its effectiveness. This would only serve to seriously jeopardize the administration of our system of criminal justice which depends on its use.

If the Court grants that this question is controlled by the exercise of prosecutorial discretion under the statute, there is no need to address ourselves to the area of procedural due process. Notwithstanding the analysis outlined above, there is no basis to validate petitioner's claim because he has been unable to establish that the removal of the case to the adult court resulted in a "grievous loss" or was attended with unfairness.

This Court has stated that a prerequisite to the application of constitutional due process requirements is that the function at issue must visit a "grievous loss" upon the one affected, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Thus, the first step in any procedural due process case is to determine whether the extent of the loss imposed is sufficiently serious to raise a constitutional issue. That loss can only be assessed by comparing that to which the accused has a right prior to state action with that to which he has a right after such action. Application of that process to the case at bar reveals that no such loss was imposed.

Prior to any decision by the prosecutor in this case, the petitioner faced the problem of accountability for his act under the criminal statues. Under the Juvenile Court Act he had no right nor even a justifiable expectation of being prosecuted as either a juvenile or as an adult. The statute creates no presumption in either direction and therefore no right vests.

The institution of proceedings in the juvenile court still created no presumption in either direction nor vested a

found wanting by the U.S. Supreme Court in In re: *Gault, supra* at 1442:

> "This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records and even as to those the evidence is that many courts routinely furnish information to the FBI and the military and on request to government agencies and even to private employers. Of more importance are police records. In most states the police keep a complete file of juvenile "police contacts" and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law enforcement agencies, the armed forces and social service agencies and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies."

An additional factor alleged by the petitioner is less severe punishment. But the Court in *In Re Gault, supra,* p. 1444 recognized that it is possible for a juvenile offender to be confined until he reaches his majority which in many instances may amount to a significantly more severe punishment. In that case a maximum two month and $50 fine penalty could have been turned into six years of confinement for the fifteen year old offender.

These problems are recognized by Chapter 37, Ill. Rev. Stat., Sec. 702-7 (5) which permits the juvenile on advice of counsel prior to an adjudicatory hearing to waive juvenile proceedings and elect to have his case heard in criminal court.

right in the accused, since the state's attorney could require that the juvenile proceedings be dropped by the simple expedient of filing criminal proceedings in the Circuit Court. In effect, a waiver of jurisdiction under the Illinois statute is a misnomer because the prosecutor has been given the power to effectively oust the juvenile court jurisdiction.

The State's Attorney exercised his discretion by prosecuting in the Circuit Court rather than in Juvenile Court. At this point petitioner's expectations were exactly the same as on the day of his arrest—to be held accountable under the criminal law for his act. No right to be prosecuted in any particular court vested. Consequently, the decision of the prosecutor visited no loss upon the petitioner. His expectations remained exactly the same after the decision as they had been preceding it.

In making the determination of whether the petitioner suffered a "grievous loss" in being transferred from Juvenile Court to the adult criminal court, it should be noted that there are certain advantages to being tried as an adult rather than as a juvenile. For example, the United States Supreme Court held in *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), that in juvenile court a trial by jury is not mandated by the due process clause. The Court pointed out that it had not determined that all constitutional rights assured the adult accused of a crime are afforded to the juvenile in a delinquency proceeding. *McKeiver, supra,* at p. 532.

Petitioner claims that the degree of secrecy afforded juvenile court proceedings help to measure the loss he will suffer. But this concept was thoroughly discussed and

Moreover, in recent years the two proceedings are tending to become more and more similar. This Court has found that a confession of a juvenile improperly had is inadmissible, *Gallegos* v. *State of Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962); *Haley* v. *State of Ohio*, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948). Adequate notice, right to counsel and the application of the essentials of due process to the delinquency hearing were recognized in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), established the rule that a conviction in a juvenile proceeding must be based on proof beyond a reasonable doubt of every fact necessary to constitute the crime.

The Juvenile Court Judge has the power under the statute to raise an objection to the transfer of the juvenile to the adult court. If the Juvenile Judge objected to the removal of the case from the jurisdiction of the Juvenile Court, the matter would have been referred to the Chief Judge of the Circuit. When the state's attorney moved to transfer the case to the Criminal Division of the Circuit Court of Cook County, the petitioner had an opportunity to demonstrate to the Juvenile Court Judge that grounds existed for him to exercise his objection. As the opinion of the U.S. Court of Appeals for the Seventh Circuit indicated, petitioner had the right to present evidence at that time in opposition to the State's motion. *United States ex rel. Bombacino* v. *Bensinger*, 498 F. 2d 875, 877-78 (7th Cir. 1974). Since the petitioner had an opportunity to present his arguments to the Juvenile Court Judge in an attempt to convince him to exercise his objection, we must agree with the Court of Appeals that no unfairness was accorded to him. *U.S. ex rel. Bombacino. supra*, p. 877.

This Court has previously denied a Petition for Certiorari to the Illinois Supreme Court in which the petition propounded the same analysis as is presently before the Court, see *People* v. *Bombacino*, 409 U.S. 912, 93 S. Ct. 230, 34 L.Ed. 2d 173 (1972).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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